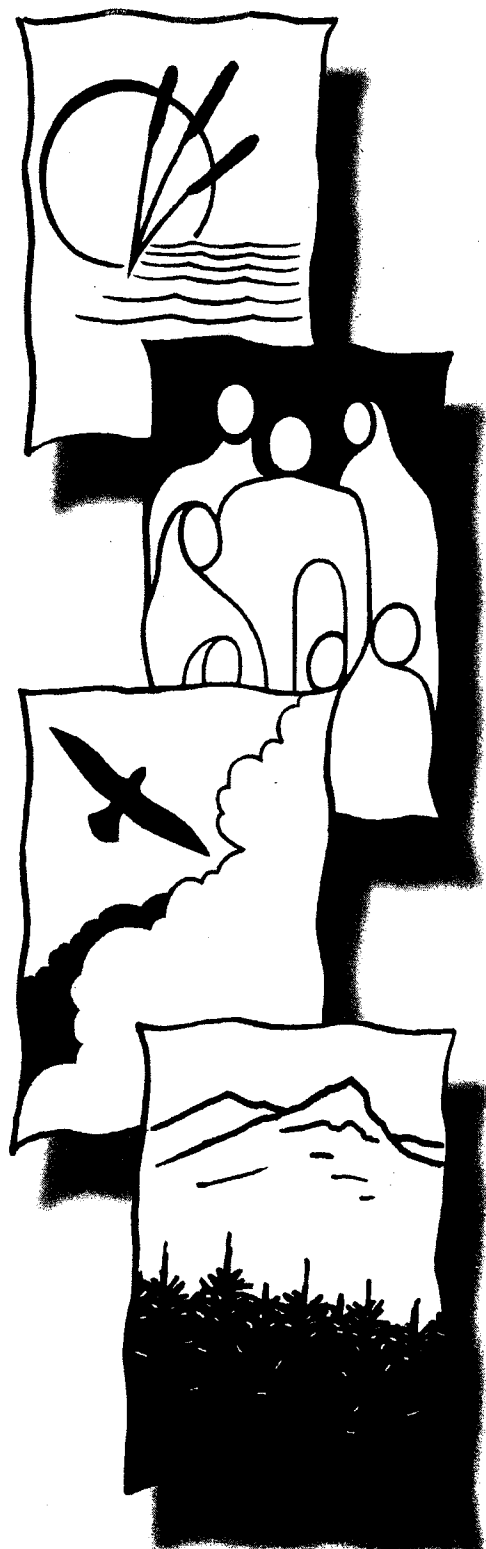


At request of Sen. Stewart-Peregoy:

STATE-TRIBAL RELATIONS IC
JULY 20, 2012
Exhibit 9



NATHPO

Tribal Consultation

Best Practices In Historic Preservation

National Association of Tribal Historic Preservation Officers

PO Box 19189 • Washington, DC 20036-9189
Phone 202.628.8476 • Fax 202.628.2241 • www.nathpo.org

IV. WHAT IS CONSULTATION WITH TRIBES AND HOW DOES IT OCCUR

Defining Consultation

The Secretary of the Interior's Standards and Guidelines offers the following definition for consultation:

*Consultation means the process of seeking, discussing, and considering the views of others, and, where feasible, seeking agreement with them on how historic properties should be identified, considered, and managed.*¹⁴

The courts have also defined consultation in a case involving the USDA Forest Service and the Pueblo of Sandia, and a historic property in Las Huertas Canyon, New Mexico.¹⁵ This case exemplifies the status of consultation between Agencies and Tribes at the beginning of the time period covered in this study and merits some elaboration.

In Pueblo of Sandia, the court held that the Agency must make a "reasonable effort" to consult with Tribes in order to take into account the effect of an undertaking on National Register eligible properties known to the Pueblo. The Forest Service had mailed a letter to the Pueblo asking for the specific locations of sites known to traditional cultural practitioners, to be mapped to a scale of 1:24,000 or better, together with information on the activities practiced, the specific dates, as well as documentation of the historic nature of the property. The Forest Service also attended meetings of the All Indian Pueblo Council and informed them of the plans for road construction through the canyon. At those meetings the Agency was informed that there were sites in the area of potential effect, but this information was not acted upon as it lacked the specificity required by the Agency. The court found that the information sought by the Agency exceeded the level of specificity required in order for the Agency to be knowledgeable about the areas of concern to the Pueblo, and take mitigating action. Further, the court noted that the occurrence of cultural practices in the area was well known, including the use of certain paths and sites within the canyon. The court held that, where there is a reasonable likelihood that traditional cultural properties are present in an area, the Agency is obliged to make a reasonable effort to identify those properties, and found that it had not done so in this case.

¹⁴ Secretary of Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, Federal Register 24 April 1998.

¹⁵ *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995).

A "good faith" effort to identify properties would have included consultation with the Pueblos beyond the initial letter and briefing.

It is important to note that the key elements of consultation identified by both the court in Pueblo of Sandia and the Secretary of the Interior's Standards and Guidelines are direct interaction and an exchange of views. That an agreement is reached may be the desired result, but the essential attributes of consultation are found in respectful, direct communication. Pueblo of Sandia affirms the opinion of many respondents to this study, that a letter inviting consultation followed by a briefing given to Tribes by the Agency does not constitute consultation.

The Consultation Process

At a minimum, consultation begins with the Agency official reviewing all known information about sites within the area of potential effect of the project. That review must also identify Native American groups with a potential interest in the area, whether or not they are physically present in the area.

The Agency official has the obligation to make a "good faith effort" to identify the consulting parties early in the planning process and give them a "reasonable opportunity" to identify concerns about effects on historic properties, advise on identification and evaluation of such properties, including traditional cultural properties and "participate in the resolution of adverse effects."¹⁶

The NHPA regulations include as consulting parties:

1. The State Historic Preservation Officer (SHPO), and on Tribal land by request or agreement or when the Tribe does not have a 101(d)(2) Tribal Historic Preservation Officer (THPO).¹⁷
2. The THPO in lieu of the SHPO for those Tribes having THPOs, or if none, then the Tribal representative in addition to the SHPO, on Tribal lands.¹⁸
3. Any Indian Tribes or Native Hawaiian organizations that attach "religious and cultural significance to historic properties that may be affected by an undertaking," "regardless of the location of the historic property."¹⁹
4. Representatives of local governments where local governments have jurisdiction on the land and in place of the Agency official by agreement.²⁰
5. The Agency official on federal land and where a permit, license, federal assistance or other approvals are authorized by the federal Agency.²¹

¹⁶ 36 C.F.R. § 800.2(c)(2)(ii)(A).

¹⁷ 36 C.F.R. § 800.2(c)(1).

¹⁸ 36 C.F.R. § 800.2(c)(2).

¹⁹ 36 C.F.R. § 800.2(c)(2)(ii).

²⁰ 36 C.F.R. § 800.2(c)(3).

²¹ 36 C.F.R. § 800.2(c)(4).

6. The public and others with a demonstrated interest in the project or their concern with the effects on historic properties.²²

Consultation between the Agency and Tribe lasts until the parties resolve the adverse effects²³ of an undertaking or until an impasse is reached and the Advisory Council is to comment upon termination of consultation.²⁴

Consequently, consultation plays a role in the planning of the undertaking, determinations that are made regarding the nature of the undertaking and its potential effects,²⁵ identification of properties of religious and cultural significance,²⁶ decisions on whether additional consulting parties should be added,²⁷ and decisions on mitigating adverse effects.²⁸

Agency Protocols

Many Federal Agencies have a Native American policy that includes acknowledgement of the need to consult with Tribes, but not all of them have translated this policy into action. Also, sometimes they confuse consultation policy, as directed by Executive Order 13175, and consultation protocols. The ACHP has noted that, "For many agencies, there remains a significant problem with implementation."²⁹ The following Agency protocols for consultation with Tribes have either been finalized or are in the draft stage:

- USDA Forest Service has a draft for FSM 1500 – External Relations, which is a comprehensive blueprint for interaction with American Indian and Alaska Native Tribal Governments, developed by the USDA National Tribal Relations Program Implementation Team. The handbook covers consultation on regulations and policies, as well as, specific activities and sets forth requirements for consultation and an evaluation process.
- The FWSA Pennsylvania Division held an Intertribal Summit in September 2003, out of which came recommended protocols. These protocols acknowledge the cultural aspects of consultation and that understanding the communication practices of a consulting partner is simply a matter of respectful behavior.
- ACHP Consultation Protocols are embodied in the Action Plan on ACHP Native American Initiatives, October 2003. The ACHP has assumed that among its tasks is a responsibility to assist all participants in understanding Native American consultation requirements in the Section 106 process.

²² 36 C.F.R. § 800.2(c)((5) & (d).

²³ 36 C.F.R. § 800.6(a).

²⁴ 36 C.F.R. § 800.7.

²⁵ 36 C.F.R. § 800.3(c)(1)(3).

²⁶ 36 C.F.R. § 800.4((b).

²⁷ 36 C.F.R. § 800.3(f).

²⁸ 36 C.F.R. § 800.5(a).

²⁹ ACHP Action Plan, October 2003, p. 5.